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What's in a Claim: Protecting Your Right to Extra Time or Money — Part One

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Buried somewhere in most commercial construction contracts are a set of procedures meant to help resolve disputes between the owner and the contractor. Almost all commercial construction contracts contain procedures that require the parties to give each other formal notice of a "claim" under the contract and then mediate the dispute before moving to arbitration or litigation.

This article will explore the fine print on making claims and share some tips and best practices to ensure contractors are taking steps to protect their rights under the contract. While there are a variety of standard contract forms in the industry, this article will consider these issues from the perspective of the American Institute of Architect (AIA) Document A201-2017 "General Conditions of the Contract for Construction" and then point out key differences with another major industry form, the ConsensusDocs. No. 200 "Standard Agreement and General Conditions Between Owner and Constructor."

The Typical Path for Dispute Resolution

Before addressing the mechanics of making a claim, it's important to understand where a claim fits in the overall dispute resolution framework. Article 15 of the AIA A201-2017 establishes a four-step process for dispute resolution:

- Notice of Claim
- Submission of Claim to an "Initial Decision Maker" (IDM)
- Mediation of Claim
- Binding Dispute Resolution (Arbitration or Litigation of Claim)

A claim, then, is the very first step in the process. Some of the steps are, importantly, described in the A201 as preconditions, meaning that the contract requires you to complete one step before moving to the next. For instance, you must first submit your claim for a decision by the IDM before moving to mediation, and mediation is, in turn, a precondition to the parties' chosen method of dispute resolution (either arbitration or litigation). It's the failure to follow these steps in order that can cause problems for contractors.

The four-step process is unique to AIA contracts. For instance, in the ConsensusDocs No. 200, which is the standard owner-contractor agreement in the series, making a claim is not part of the dispute resolution process *per se*. Instead, the first step in the process is for parties to attempt to resolve their dispute through informal "direct discussions." If the discussions don't resolve the dispute, then the next step is to attempt dispute "mitigation" (a term not used in the AIA

documents) by means of a “Project Neutral” (similar to the Initial Decision Maker) or a “Dispute Review Board,” a concept with no analog under the AIA documents.

Both systems are similar though in that, as the parties move through the dispute resolution process, each step becomes progressively more formal. The process starts with making a claim and ends in a binding dispute resolution procedure — whether that is arbitration or litigation. The rationale behind the approach of progressive formality is to give parties the opportunity to resolve their disputes early in the process before they spend a lot of time and money fighting and disrupting the project. Even the act of putting a claim in writing, which is the first step in the process, can help resolve a dispute, because it gets parties on the same page about what’s in contention.

Defining a “Claim”

Since making a claim is the first step in the dispute resolution process, understanding the definition of a claim is critical. The AIA A201 gives a broad definition to a “claim.” As you would expect, a claim includes the two classic areas of dispute on a construction project: demands for payment of money or extra time to complete the work.

These two items fit within the traditional notion of a “construction claim.” But a claim under the A201 also includes any “other disputes and matters in question between the Owner and the Contractor.” This language is intended to pull almost all disputes within the ambit of the procedures in Article 15.

By contrast, in the ConsensusDocs No. 200 a “claim” (not a defined and capitalized term) is narrower and is essentially just a “request for an increase in the Contract Price or the Contract Time.” The basic claims procedures in the No. 200 are, interestingly enough, not even found in the section on dispute resolution but in Article 8 titled “Changes.” Therefore, in the ConsensusDocs framework, claims are seen as arising from changes in the contract. Arguably, the narrower definition of a claim in the ConsensusDocs series means there are fewer instances where the contractor would be required to give the owner formal notice.

The first step in making a successful claim is to recognize whether or not you have one. Claims can be hard to spot and instances when a contractor might be entitled to extra time or money under the contract aren't always clear. Consider the following real world example. The contractor and the owner had a cost-plus contract with a guaranteed maximum price. The contract established procedures for the owner to audit the contractor's cost documentation.

In the middle of the job, the owner hired a cost consultant and required the contractor to work directly with the consultant. The consultant implemented a new set of audit procedures and required a host of additional information from the contractor — information that wasn't required under the contract. The consultant would even show up at the contractor's home office unannounced. The contractor contended that having to work with the consultant and provide the extra information was a changed condition and rightly made a claim for the added cost to comply.

Unless there's another provision in the contract that explicitly governs the dispute between the parties — say a clause giving the owner the right to carry out the work after obtaining pre-approval from the architect — most disputes, including the one just described, are a claim under the contract.

TIP: If you're using an AIA contract, remember the broad definition of a claim. Err on the side of caution and treat your dispute with the owner as if it's a claim subject to the dispute resolution procedures of Article 15.

The purpose of giving formal notice of a claim is to allow the other party an opportunity to address the issue and minimize any financial harm that might arise from the situation. Prompt notice is usually thought to be more of a benefit to the owner than the contractor, since it's usually the contractor making claims against the owner and not vice-a-versa. For instance, if the owner is taking too long to select an allowance item, say plumbing fixtures, and the delay is somehow affecting the critical path, then prompt notice that the contractor plans to seek more time and money for the delay should encourage the owner to hurry up and make its choice.

TIP: If you remember that the purpose of giving notice of your claim is to allow the other party to respond and take action to minimize costs, it'll help you spot a claim. Ask yourself: If I was on the other side, would I want to know about this situation so I could do something about it? If so, you should probably make a formal claim.

How to Make a Claim

Most contracts spell out exactly when and how to give notice of a claim. Following the proper notice procedures in your contract is critical if you want to make a successful claim. The problem for most contractors is that, at the time they need to make a formal claim, they don't yet have a lawyer involved. It's imperative, then, that if contractors are flying solo without their lawyer, they must be familiar with the basic rules for making a claim.

There are three primary considerations when it comes to giving notice of your claim: (1) when you must give the notice, (2) how you must send the notice and (3) who must receive the notice.

When to Give Notice

Under the A201, claims must be "initiated" within 21 days of either (a) the "occurrence of the event giving rise to the Claim" or (b) when "the claimant first recognizes the condition giving rise to the claim," whichever is later. This approach recognizes the reality that just because something happened during the course of a project — say, the architect's response to an RFI conflicted with one of the drawings — it doesn't mean the contractor realized it (or should have realized it) immediately. ConsensusDocs also gives the contractor an opportunity to "recognize the condition," but, surprisingly, the No. 200 has a shorter deadline than the A201 and only allows 14 days to give notice.

TIP: Owners will often try to negotiate a shorter time for giving notice of a claim in hopes it will cause the contractor to miss the deadline. It is not uncommon to see an owner try to reduce the notice period to 48 hours or less. Resist this effort and push for a minimum of 21 days to give notice, arguing that a short notice period will make the parties' relationship contentious from the get-go as the contractor will need to fire off claims notices even before it has had an opportunity to fully evaluate the situation.

Note, too, that the claim need only be "initiated" within the 21 days. This is usually understood to mean that the contractor doesn't need to give the full details of the claim or even a full accounting of its money damages. Instead, it's usually enough for the contractor to state in writing that an event transpired, it regards this event as a "claim," and will be entitled to extra time or money as a result.

TIP: When giving notice of a claim, reserve your right to seek additional time or money down the road when the full impact of the change, delay, etc., becomes known.

Unlike the AIA, ConsensusDocs follows a two-step notice process. This process should be familiar to any contractor who's done work for the federal government, since it's modeled on the Changes and Delays Clauses of the Federal Acquisition Regulation (FAR). First, the contractor must give the owner notice of the changed condition or the delay. If the claim is based on a changed condition, the deadline is 14 days. If the claim is based on delay, then there is no fixed deadline, but the notice must be given promptly "after the contractor first recognizes the delay." What counts as "prompt" notice will depend on the circumstances, but in the context of a delay claim, sooner is better.

Second, after the contractor provides notice of the change or delay, it must then follow up within 21 days with "written documentation of its claim, including appropriate supporting documentation." Unlike the A201, the ConsensusDocs No. 200 actually requires the contractor to support its claim with backup documentation. Of course, the full impact of a change or delay probably won't be known within 21 days. In those instances, the contractor should provide what's available and then explicitly reserve its right to seek additional costs when the full impact of the situation becomes known.

TIP: If you encounter delays or changed conditions, don't wait until the end of the job to submit a change order request. Be proactive about asserting claims throughout the project. It'll ensure you're preserving your rights and will make for a better relationship with the owner.

Make sure you return to our site next week for the second half of Farley and Wells's article, where the authors will discuss how to give notice and who must receive notice.

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